

1 Jaime Aguirre-Olivas, )  
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 3 Petitioner, )  
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 5 v. )  
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 7 UNITED STATES OF AMERICA, )  
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 9 Respondent. )  
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**\*E-FILED - 1/29/13\***

Nos. C-12-03908-DLJ  
 CR-10-00319-DLJ  
**ORDER**

On June 28, 2011 Defendant Jaime Aguirre-Olivas (Aguirre-Olivas) was sentenced to 42 months in prison for a violation of 8 U.S.C. § 1326, Illegal Re-entry following deportation. On February 6, 2012 Aguirre-Olivas filed a Motion for Time Reduction by an Inmate in Federal Custody in his criminal case, CR 10-0319. On July 16, 2012, Aguirre-Olivas filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct his sentence (case C12-3908).

The Time Reduction Motion claims violation of his equal rights as he asserts that were he a United States Citizen he would be entitled to a one year reduction of his sentence for participation in a drug program during his incarceration.

The 2255 Motion claims ineffective assistance of counsel, alleging that at the sentencing counsel for defendant failed to correctly address defendant's prior convictions. Aguirre-Olivas also contends that counsel was ineffective in that he claims counsel caused him to waive his right to appeal.

Having now considered the papers submitted, and the applicable law, the Court hereby denies the motion.

1 I. Background

2 On April 21, 2010, Aguirre-Olivas was charged in a single  
3 count indictment with illegal re-entry following deportation in  
4 violation of 8 U.S.C. § 1326(a) and (b). On April 12, 2011,  
5 Aguirre-Olivas entered an "open" guilty plea. The Court informed  
6 Aguirre-Olivas that the maximum prison sentence for this offense  
7 was 20 years, the maximum fine was \$250,000 and the maximum term of  
8 supervised release was three years. At that court appearance a date  
9 was set for sentencing.  
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11 Prior to the sentencing, the United States Probation Office  
12 issued a Pre-Sentence Investigation Report ("PSR") recommending a  
13 sentence of 60 months. On June 21, 2012, Aguirre-Olivas' defense  
14 counsel filed a nineteen page sentencing memorandum in which she  
15 argued that the Court should enter a sentence of 40 months. The  
16 government filed a sentencing memorandum which recommended a  
17 sentence of 77 months.  
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19 The sentencing hearing was held on June 28, 2011. The Court  
20 made the following sentencing calculation: the proper base offense  
21 level of 8 was to be increased by 16 levels because of defendant's  
22 prior State of California conviction of Assault with a Deadly  
23 Weapon, a crime of violence. After the three level reduction for  
24 acceptance of responsibility, defendant's adjusted offense  
25 level was 21. As Aguirre-Olivas was in Criminal History Category  
26 VI, his USSG Sentence Guideline range was 77 to 96 months.  
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1           At the sentencing hearing defense counsel made numerous  
2 arguments urging the Court to impose a reduced sentence of 40  
3 months. Defense counsel objected to the 16-level enhancement, both  
4 because the conviction was over 15 years old and also as the  
5 enhancement was excessive in light of the circumstances where there  
6 was serious bodily injury to the victim. See Sentencing Transcript,  
7 at pp. 4-5. Defense counsel further argued that Aguirre-Olivas'  
8 prior conviction was "double-counted" because it was counted for  
9 purposes of increasing the offense level but had also been taken  
10 into consideration in raising his criminal history. Id. at 16-18.  
11 Finally, defense counsel urged the Court to take into account  
12 various mitigating factors, including Aguirre-Olivas' wife's  
13 medical condition, his father's poor health, and daughter's  
14 learning disability. Id. at 12-14.

15           The Court considered all of defense counsel's objections.  
16 The Court noted that the enhancement was part of the Sentencing  
17 Guidelines and so should be included in the calculation but that  
18 the Court would take all of counsel's arguments into consideration  
19 in determining the final sentence to be imposed. The Court  
20 sentenced defendant to a below guidelines sentence of 42 months in  
21 light of the age of defendant's prior conviction, the circumstances  
22 of the conviction, and the sentencing factors under § 3553(a). Id.  
23 6, 22.

24           On July 16, 2012, Aguirre-Olivas filed his Petition, in which  
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1 he alleges three grounds for habeas relief. First, he argues that  
2 his attorney provided him with ineffective assistance of  
3 counsel because she failed to address the fact that his prior  
4 Assault with a Deadly Weapon conviction should not have led to a  
5 16-level enhancement. He appears to also argue that his  
6 attorney was ineffective because she failed to challenge the  
7 enhancement due to his prior felony conviction despite that it was  
8 not proven beyond a reasonable doubt nor admitted by him, in  
9 violation of his Apprendi rights. Third, he argues that "pursuant  
10 to the new Supreme Court ruling in Pepper [sic], [he] is entitled  
11 relief, in regard to [his] post-sentencing rehabilitation." See  
12 Aguirre-Olivas' Petition at page 8.

## 13 II. Legal Standard

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15 A claim for ineffective assistance of counsel is subject to  
16 the two-prong test set forth in Strickland v. Washington, 466 U.S.  
17 668, 687 (1984). A lawyer's performance is constitutionally  
18 deficient only when it "so undermines the proper functioning of the  
19 adversarial process that the [proceedings] cannot be relied upon as  
20 hav[ing] produced a just result." Id. at 687.

21  
22 A petitioner claiming ineffective assistance of counsel bears  
23 the burden of demonstrating that, under all the circumstances of  
24 his case, (1) his counsel's performance was so deficient that it  
25 fell below an "objective standard of reasonableness" and (2) his  
26 counsel's deficient performance prejudiced him, meaning "there is a  
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1 reasonable probability that, but for counsel's unprofessional  
2 errors, the result of the proceeding would have been different."  
3 Hensley v. Crist, 67 F.3d 181,184-85 (9th Cir. 1995). Furthermore,  
4 "[r]eview of counsel's performance is highly deferential and there  
5 is a strong presumption that counsel's conduct fell within the wide  
6 range of reasonable representation." United States v.  
7 Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987).

9 An evidentiary hearing is not required "if the petitioner's  
10 allegations, when viewed against the record, fail to state a claim  
11 for relief." United States v. McMullen, 98 F.3d 1155, 1158 (9th  
12 Cir. 1996).

### 13 III. Aguirre-Olivas' 2255 Motion

#### 14 A. Counsel's Alleged Failure Regarding the 16 level 15 enhancement.

16 Aguirre-Olivas first contends that his counsel was  
17 ineffective as he asserts that she "failed to address the fact  
18 that [his] prior Assault with a Deadly Weapon conviction did not  
19 warrant a 16-point enhancement." The Court finds not only that  
20 there is no factual support in the record for this claim, but that  
21 the record indicates that counsel for Aguirre-Olivas' made numerous  
22 efforts to argue this very point, and ultimately the Court  
23 concurred with his counsel and gave Aguirre-Olivas a sentence which  
24 was substantially below the guidelines range. Counsel for Aguirre-  
25 Olivas filed a nineteen-page sentencing memorandum addressing this  
26 point and at the sentencing hearing argued that a 16 level  
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1 enhancement to the applicable base offense level was excessive  
2 because Aguirre-Olivas' prior conviction for Assault with a Deadly  
3 Weapon was not a particularly serious one and because the  
4 conviction was over 15 years old. See Sentencing Transcript at  
5 pages 4-5.

6  
7 While the Court still found that the 16 level enhancement was  
8 appropriate under the current sentencing guidelines, the Court  
9 considered defense counsel's objections and arguments in its  
10 determination of the appropriateness of a sentencing variance under  
11 Booker. Moreover, defense counsel made additional arguments that  
12 Aguirre-Olivas' prior conviction for Assault with a Deadly Weapon  
13 was "double-counted" because it was counted for purposes of his  
14 criminal history and offense level. *Id.* at 16-18. Finally, defense  
15 counsel urged the Court to consider additional mitigating factors,  
16 including Aguirre-Olivas' wife's poor medical condition, his  
17 father's poor medical condition, and daughter's learning  
18 disability. *Id.* at 12-14.

19  
20 Aguirre-Olivas has failed to meet his burden of demonstrating  
21 that his counsel's performance was constitutionally deficient, as  
22 his counsel in all ways represented him diligently. Moreover,  
23 Aguirre-Olivas's claim fails because he has suffered no prejudice  
24 as there was no error in the application of the 16-level sentence  
25 enhancement and also Aguirre-Olivas received a below guidelines  
26 sentence.  
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1 B. Counsel's Alleged Failure To Challenge Aguirre-Olivas'  
2 Prior Felony Conviction On the Grounds That It Was Not Proven  
3 Beyond A Reasonable Doubt

4 Aguirre-Olivas argues that his attorney was ineffective  
5 because she failed to challenge that the fact of the prior felony  
6 conviction having occurred prior to his deportation had not proven  
7 beyond a reasonable doubt or admitted by him, therefore violating  
8 his rights under Apprendi v. New Jersey, 530 U.S. 466 (2000). This  
9 argument has been foreclosed by Almendarez-Torres v. United States,  
10 523 U.S. 224 (1998). See United States v. Almazan-Becerra,  
11 482 F.3d 1085, 1091 (9th Cir. 2007) (reaffirming that a prior  
12 conviction need not be submitted to a jury and proved beyond a  
13 reasonable doubt). See also United States v. Beng-Salazar, 452  
14 F.3d 1088, 1091 (9th Cir. 2006) (upholding sentencing enhancement  
15 based on prior conviction of crime of violence not admitted by  
16 defendant). Therefore, the use of Aguirre-Olivas' prior crime of  
17 violence conviction as a sentencing enhancement was valid and  
18 his defense counsel's action in not objecting was not deficient.

19  
20 C. Alleged Waiver of Right to Appeal

21 Aguirre-Olivas alleges without any factual support that his  
22 counsel caused him to waive his right to appeal. It is clear from  
23 the record at the sentencing hearing that the Court advised  
24 Aguirre-Olivas of his right to appeal and the timing and notice  
25 requirement attendant to that right. Therefore it is clear that  
26 Aguirre-Olivas was on notice of his rights. There is nothing before  
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1 the Court which would indicate that defense counsel interfered wiht  
2 those rights, and therefore there is no basis for the Court to find  
3 defense counsel's performance ineffective.

4 D. Is Aguirre-Olivas entitled to relief under Pepper?

5 Aguirre-Olivas argues that "pursuant to the new Supreme Court  
6 ruling in Pepper [sic], [he] is entitled relief, in regard to [his]  
7 post-sentencing rehabilitation." See Aguirre-Olivas' Petition at  
8 page 8. Aguirre-Olivas relies on Pepper v. United States, 562 U.S.  
9 ----, 131 S.Ct. 1229 (2011). In Pepper, the Supreme Court held that  
10 when a defendant's sentence has been set aside on appeal and his  
11 case remanded for re-sentencing, a district court may consider  
12 evidence of a defendant's rehabilitation since his prior sentencing  
13 to award a downward variance from the advisory Guidelines range.  
14 Id. at 1236. However, Pepper is inapplicable to Aguirre-Olivas, as  
15 Pepper does not address habeas corpus proceedings after a final  
16 sentence has been ordered which is the case here.

17 IV. Aguirre-Olivas' Motion for Sentence Reduction

18 In his motion for Time Reduction Aguirre-Olivas claims  
19 violation of his equal rights as he asserts that were he a United  
20 States Citizen he would be entitled to a one year reduction of his  
21 sentence for participation in a drug program during his  
22 incarceration. However, this argument has been raised previously  
23 and rejected by the Ninth Circuit. See McLean v. Crabtree, 173  
24 F.3d 117 (9<sup>th</sup> Cir. 1999).  
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V. Conclusion

For the reasons stated above, petitioner's Motion for Sentence Reduction and 2255 Motion are both DENIED.

IT IS SO ORDERED

Dated: January 29, 2013



D. Lowell Jensen  
United States District Judge

**United States District Court**  
For the Northern District of California

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Copy of Order Mailed on 1/29/13 to:

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Copy of Order E-Filed to Counsel of Record: